In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 784

THE BOARD OF PUBLIC INSTRUCTION OF BAY COUNTY, FLORIDA, ET AL., PETITIONERS

v.

JEAN CAROLYN YOUNGBLOOD, ET AL., AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A11) is not reported. The decision of the district court is also unreported.

JURISDICTION

The decision of the court of appeals was entered on July 24, 1970, and the mandate issued immediately. A timely petition for rehearing was denied on September 11, 1970. The petition for a writ of certiorari was filed on October 1, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

408-556—70

QUESTION PRESENTED

Whether the court of appeals correctly rejected the attendance zones in petitioners' school desegregation plan, which would effectively maintain three segregated schools, when feasible alternatives existed which, if adopted, would desegregate all schools.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pertinent excerpts from the Fourteenth Amendment to the Constitution of the United States and the Civil Rights Act of 1964 are set forth at pages 3–4 of the petition.

STATEMENT

This case, involving the desegregation of schools in Bay County, Florida, was brought by private plaintiffs in 1963. The United States intervened in 1966 pursuant to Section 902 of the Civil Rights Act of 1964. 42 U.S.C. 2000h–2. The Bay County school system, which includes the city of Panama City, has approximately 17,934 students enrolled during the 1970–71 school year, of whom approximately 2,969 (18 percent) are black. Involved in this petition is the desegregation of three historically black schools (one junior high school and two elementary). All other schools in the system have been desegregated by order of the district court and are not in issue here.

On January 30, 1970, the district court ordered the implementation of a desegregation plan proposed by the school board which utilized geographic zones as

the method of student assignment.[1] The three traditionally black schools in question, Rosenwald Junior High School and Harris and Patterson Elementary Schools, are located in the Panama City portion of the district. Each of the three schools is located approximately 2-to-2½ miles from one or more traditionally white schools serving the same grades. The geographic zones for the two elementary schools were admittedly drawn without regard to the effect the zones would have on desegregation (Pet. 13). The zone for the junior high school was drawn to fill approximately half of the schools' capacity, with a resulting student enrollment that is very predominantly black. Under the plan approved by the district court, the February 1970 enrollment for the three schools was as follows:

School	February 1970 enrollment		
	White	Black	Total
Rosenwald Junior High School	75	275	350
Harris Elementary	3	472	475
Patterson Elementary	115	473	508

The court of appeals noted that an extant HEW plan, if adopted, would have effectively desegregated the three schools (Pet. App. A4),[2] and held the plan

[1] During the 1969–70 school year, the school district operated under a freedom of choice student assignment plan. During that school year, two of the three schools in question remained all black and the third enrolled two white students.

[2] The district court rejected a plan formulated by the Department of Health, Education and Welfare that would have established a larger attendance zone around the junior high school,

approved by the district court to be unacceptable (Pet. App. A3–A4). It concluded that the board had adopted a student assignment plan "that to a great extent perpetuates 'the comfortable security of the old, established discriminatory pattern,' " even though the record contained alternatives "available to the Board which would totally eradicate all vestiges of the dual school system and deal with the problems of the flight of white parents and resegregation" (Pet. App. A6–A7). The court of appeals reversed and remanded the case to the district court with the suggestion that the school district work with HEW to revise the geographic zones proposed by HEW on the basis of current demographic information. The district court was ordered to hold a hearing and ap-

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bringing that school closer to its capacity, and would have paired the two elementary schools with adjoining white schools each approximately 2-to-2½ miles distant. The projected enrollment under the HEW plan was as follows:

School	Projected enrollment		
	White	Black	Total
Rosenwald Junior High School	629	191	820
Harris Elementary	256	82	338
Patterson Elementary	324	84	408

There were also two other plans in the record that were rejected by the district court: a plan formulated by the school board which would convert the three black schools to special centers and assign the students formerly enrolled in those schools to traditionally white schools and a plan proposed by the United States that would convert the two black elementary schools to sixth grade centers serving all sixth graders in the Panama City area. The black elementary students in grades 1–5 would be assigned to traditionally white elementary schools.

prove a more effective desegregation plan to be implemented in September 1970 (Pet. App. A10–A11).

On remand the district court approved a desegregation plan that modified the zone line of Rosenwald Junior High School and created sixth grade centers at Harris and Patterson Elementary Schools.[3] The enrollment at each of these schools as of September 10, 1970, was as follows:[4]

School	Enrollment		
	White	Black	Total
Rosenwald Junior High	400	280	680
Harris Elementary	374	144	518
Patterson Elementary	427	88	515

ARGUMENT

The issue presented is whether the plan previously approved by the district court disestablished the dual school system.[5] As the court of appeals noted, under that plan the attendance zone lines for the elementary schools were drawn without regard to their impact on desegregation and the zone lines for the junior high school were drawn so as to underutilize the facility

[3] The plan approved by the district court constituted a revised version of a plan drawn by the Department of Justice (see note 2, *supra*). Revisions were formulated by the school district and all parties agreed that the plan would establish a unitary school system (Pet. App. A13, A15, A17, A19).

[4] Since there has been no evidentiary hearing concerning the court-ordered plan, the record contains no information concerning the number of students transported under the plan.

[5] Insofar as petitioners are complaining of orders of the district court rendered subsequent to the decision of the court of appeals (see Pet. 2, 9–10) they are, of course, before the wrong court. 28 U.S.C. 1291.

when its full utilization would have resulted in desegregation. We believe that the court of appeals was correct in holding that the plan was constitutionally inadequate, in the face of feasible alternative plans which would desegregate the three schools. The court's decision, of course, merely follows this Court's directions in *Green* v. *County School Board,* 391 U.S. 430, 439:

> The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness.

Petitioners, nonetheless, contend that the "classification of school children by race in order to end the evils of racial classification" is unlawful (Pet. 14); in short, that the Constitution precludes benign as well as invidious uses of race by the State. But it was settled in *Green* that a school board must take race into account in order to disestablish a dual school

system. 391 U.S. at 437–38, 440, 442 n. 6. As the court of appeals explained the matter in this case: "At this point, and perhaps for a long time, true nondiscrimination may be attained, paradoxically, only by taking color into consideration" (Pet. App. A10).[6] See *United States* v. *Jefferson County Board of Education,* 372 F. 2d 836, 876 (C.A. 5), affirmed on rehearing, 380 F. 2d 385 (C.A. 5) (*en banc*), certiorari denied *sub nom. Caddo Parish School Board* v. *United States,* 389 U.S. 840; *Offerman* v. *Nitkowski,* 378 F. 2d 22 (C.A. 2); *Norwalk Core* v. *Norwalk Redevelopment Agency,* 395 F. 2d 920, 931 (C.A. 2). See, also, *Louisiana* v. *United States,* 380 U.S. 145, 154.

Finally, the petitioners are, of course, mistaken in their assertion that the court of appeals has required racial balance in the schools in question. The decision below, as we have shown, merely requires petitioners to adopt feasible means to desegregate all schools that remain as vestiges of the dual school system, and in this there is no novelty.

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[6] Equally misplaced is petitioners' reliance upon Sections 401(b) and 407(a) of the Civil Rights Act of 1964. As we explained in our Memorandum in *McDaniel* v. *Barresi*, No. 420, this Term (Pet. 11–12), the purpose of these provisions was to make clear that the 1964 Act did not grant to federal officials or courts the power to require remedial action by school systems which were already in compliance with the Fourteenth Amendment. Since, for the reasons stated above, the decision of the court of appeals does not require racial balance and the case does not involve the issue of whether purely adventitious, de facto segregation gives rise to remedial obligations under the Fourteenth Amendment, the disclaimers of the Civil Rights Act are totally inapposite here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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